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Nuccio v. Nuccio: The Doctrine of Equitable Estoppel Will Not Bar the Statute of Limitations Defense in a Child Sexual Abuse Case Involving Repressed Memory

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I. INTRODUCTION

Kathleen Nuccio alleged that she was sexually abused by her father when she was three years old.[1] He continued to sexually abuse her for ten long years.[2] He threatened her life when he held a chisel to her throat and vowed to kill her if she ever told anyone of the abuse.[3] Luke Nuccio not only sexually defiled his daughter but also verbally abused her and physically beat her until she was seventeen years old.[4] One such beating caused damage so severe to Kathleen's ear that she was forced to have surgery.[5]

Kathleen never spoke of the abuse during the first forty years of her life.[6] Instead, the truth remained locked up inside of her. Rather than dealing with the reality of the abuse and the subsequent feelings of fear, humiliation, and isolation, Kathleen repressed her memories of the horrors that she had suffered at the hands of her father.[7] When memories of the abuse began to reveal themselves to her, the law told her it was too late and that nothing could be done. The message is unambiguous and abhorrent to reason: a father may steal his daughter's innocence and memory and never be held legally responsible for his actions.

Kathleen Nuccio, at the age of forty-four, filed suit to recover for intentional infliction of emotional distress for sexual abuse allegedly inflicted upon her as a child by her father.[8] Kathleen told the court that she experienced traumatic amnesia for over thirty years.[9] Luke Nuccio moved for summary judgment based on the statute of limitations.[10] After the United States District Court for the District of Maine granted the motion, Kathleen appealed to the United States Court of Appeals for the First Circuit. Finding no clear and control-

1. *See* Brief of the Appellant at 2, Nuccio v. Nuccio, 673 A.2d 1331 (Me. 1996) (No. Fed-95-518).
2. *See id.*
3. *See id.* at 3.
4. *See id.*
5. *See id.*
6. *See id.* at 1.
7. *See id.* at 4.
8. *See* Nuccio v. Nuccio, 62 F.3d 14, 15 (1st Cir. 1995).
9. *See id.*
10. *See id.*

ling precedent in state law, the court of appeals certified a question to the Supreme Judicial Court of Maine, sitting as the Law Court.[11]

The case presented the issue of whether equitable estoppel barred Luke Nuccio from raising the statute of limitations defense because Kathleen's childhood memories of sexual abuse remained repressed as a result of her father's threats and acts of violence.[12] The Law Court held that Luke Nuccio should not be estopped from raising the statute of limitations as an affirmative defense.[13]

Generally, this Note considers the various legal and equitable remedies available to an adult who has repressed memories of childhood sexual abuse, including the procedural and substantive burdens that she faces in asserting her claim. Part II considers the phenomenon of repressed memory resulting from childhood sexual abuse. Part III discusses the historical and procedural background of the subject case in the context of the statute of limitations, the delayed discovery rule, and the doctrine of equitable estoppel in Maine and other jurisdictions. Part IV reviews the *Nuccio* decision and the reasons equitable estoppel cannot apply in cases of child sexual abuse when the victim has repressed her memories. Part V recommends that courts invoke fraudulent concealment, an equitable principle, to bar a defendant's statute of limitations affirmative defense in abuse cases involving repression when legal remedies and equitable estoppel are otherwise unavailable. Finally, this Note concludes that, although the Law Court's decision in *Nuccio* to deny Kathleen relief based on equitable estoppel was justifiable, the court should invoke an equitable remedy, like fraudulent concealment, in favor of victims with repressed memories who were abused prior to 1991 until the Legislature extends the discovery rule to the prior statute of limitations.

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11. *See id.* at 17-18. The question was certified pursuant to title 4, section 57 of the Maine Revised Statutes which provides, in pertinent part:

> When it shall appear to the Supreme Court of the United States, or to any court of appeals or district court of the United States, that there are involved in any proceeding before it one or more questions of law of this State, which may be determinative of the cause, and there are no clear controlling precedents in the decisions of the Supreme Judicial Court, such federal court may certify any such question of law of this State to the Supreme Judicial Court for instructions concerning such question of state law, which certificate the Supreme Judicial Court may, by written opinion, answer.

ME. REV. STAT. ANN. tit. 4, § 57 (West 1989). *See also* ME. R. CIV. P. 76B (judicial procedure for certified questions).

12. Nuccio v. Nuccio, 673 A.2d 1331, 1332 (Me. 1996).

13. *See id.* at 1335.

II. BACKGROUND: THE ROLE OF REPRESSION IN CHILD SEXUAL ABUSE

Despite the prevalence and severity of child sexual abuse,[14] American society has only recently begun to acknowledge the problem and take steps to prevent abuse, protect the abused, and educate communities about this social malady.[15] Traditionally, skepticism and disbelief have surrounded charges of childhood sexual abuse, causing the abused to feel isolated and ashamed even after the abuse has ceased. Fortunately, increased media coverage and national awareness of childhood sexual abuse has resulted in greater opportunity for legal redress and has encouraged victims to expose their secrets and their abusers.[16]

Cases of child sexual abuse often include an element of repression. The study of the "repressed memory" phenomenon[17] dates back to the turn of the century "when Sigmund Freud theorized that the conscious mind can push away, or repress, anxiety-provoking ideas. When submerged, he said, potent memories can cause both physical and mental symptoms."[18] Similarly, studies and observations by philosopher and psychologist William James in 1891 indicated that "strong emotions (whether positive or negative) produce

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14. *See generally* Andrew Vachss, *If We Really Want To Protect Children*, PARADE, Nov. 3, 1996, at 5 (discussing the rise in reported incidents of child sexual abuse over the last two decades).

15. *See generally* Gregory G. Gordon, Comment, *Adult Survivors of Childhood Sexual Abuse and the Statute of Limitations: The Need For Consistent Application of the Delayed Discovery Rule*, 20 PEPP. L. REV. 1359, 1363 (1993) (explaining that "[e]xperts believe that as many as one in three American females and one in six males are sexually abused during childhood").

16. *See* Vachss, *supra* note 14, at 5. Vachss describes the continual metamorphosis of public opinion and reaction to child sexual abuse:

> Like a pendulum, press coverage swung from one extreme to the other. From being reported so rarely that many doubted its very existence, child abuse became such a frequent subject of coverage that rarely a day went by without new accounts of horrors.
>
> Now the media spotlight has been turned on defendants who maintain that they have been falsely accused of sexually abusing children . . . .

Id.

17. *See generally* Douglas R. Richmond, *Bad Science: Repressed and Recovered Memories of Childhood Sexual Abuse*, 44 U. KAN. L. REV. 517, 520 (1996) (defining repressed memory as the "complete absence of awareness or memory of a traumatic event from the time of its occurrence until a period of years thereafter. The person purportedly experiencing the trauma buries the memory deep in his or her mind to avoid the troubling emotions associated with the memory of the trauma." (citing Donald J. Hirsh & Susan Elbin, *Repressed and Recovered Memories of Childhood Sexual Abuse*, FOR THE DEF., Aug. 1994, at 20, 23)).

18. Nancy Wartik, *A Question of Abuse*, AM. HEALTH, May 1993, at 62, 64. Wartik explained that Freud, in his early work, concluded that many of the women he worked with, who possessed mental and emotional symptoms, had been abused children. Freud subsequently revoked this theory of repression by saying that memories of sexual abuse were fantasies. *See id.*

strong memories, less subject to distortion and decay than normal memory."[19] Today, the psychology profession remains divided about whether the human mind can effectively and accurately recall repressed memories from childhood.[20] In fact, due to the lack of available empirical data supporting the existence of repressed memory, some skeptics challenge the concept of repression altogether.[21]

In an effort to characterize the various psychological effects of child sexual abuse, scholars have labeled the psychological and emotional reactions common to survivors, such as denial, dissociation, and amnesia, as "Post-Incest Syndrome."[22] Post-Incest Syndrome is comparable to Post-Traumatic Stress Disorder (PTSD) in that both are responses to traumatic events so severe that the individual unconsciously invokes psychological defense mechanisms to escape the physical trauma.[23] The "essential feature of [PTSD] is the development of characteristic symptoms" after experiencing or witnessing "an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity."[24] Theoretically, these

19. MARK PENDERGRAST, VICTIMS OF MEMORY 105 (2d ed. 1996). *See also*, State v. Hungerford, Nos. 94-S-045 to 94-S-047, 93-S-1734 to 93-S-1936, 1995 WL 378571 (N.H. Sup. Ct. May 23, 1995). Expounding on William James's theory and discussing the scientific validity of recovered memory research done by Harvard psychiatrist Bessel van der Kolk, the *Hungerford* court wrote:

> Recent laboratory research has explored the theory that traumatic memory may be processed differently than ordinary memory. This theory incorporates the concepts of childhood memory development from a behavioral to a narrative memory system. Through a series of PET scans of the human brain during the occurrence of flashbacks, Dr. van der Kolk claims to have provided biological evidence that traumatic memory is in fact processed differently than ordinary memory. Based on his studies, Dr. van der Kolk believes traumatic memory is sensual and emotional, and like childhood behavioral memory, cannot be verbalized on a narrative level. Traumatic memory may not be as accessible as ordinary memory and it may be necessary to reinstate the emotional level of consciousness experienced during the trauma in order to retrieve the memory. These studies represent the "cutting edge" of present traumatic memory research.

Id. at *8.

20. *See* PENDERGRAST, *supra* note 19, at 79-80 (noting that experimental psychologists discredit the repression theory because there is no scientific proof while clinical psychologists maintain that there is proof of repression in the words of the survivors themselves).

21. *See id.* at 81-87.

22. *See* Gordon, *supra* note 15, at 1366.

23. *See generally* Jocelyn B. Lamm, *Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 YALE L.J. 2189, 2192-95 (1991) (describing the traditional pattern of classic psychological responses to childhood incestuous abuse).

24. AMERICAN PSYCHIATRIC ASS'N DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS, 424 (4th ed. 1994) [hereinafter DSM-IV]. According to the DSM-IV, "[t]he characteristic symptoms resulting from the exposure to the extreme trauma include persistent reexperiencing of the traumatic event . . ., persistent avoidance of stimuli associated with the trauma and numbing of general responsive-

reactions tend to help victims deal with the trauma during the period of the abusive behavior.[25] Potentially, a person may continue to "employ these defense mechanisms well into adulthood."[26]

While biologists seek to understand the workings of memory recovery, clinical studies on repression have convinced many researchers of the mind's ability to repress traumatic memories for long periods of time.[27] Supporters of repressed memory, who liken repression to PTSD, argue that "[w]hen a person has been repeatedly traumatized, as some abuse victims have been, he is likelier to suffer from amnesia . . . '[because] if someone has access to hurt you again and again, you can anticipate what's going to happen and muster up very amazing defenses against it.'"[28] Although believers of the repression phenomenon tend to agree that repression may cease to be helpful in adult life, these defenses often become a way of life for the victims, effectively preventing the traumatic event from penetrating the victim's consciousness for long periods of time.[29] Conversely, disbelievers argue that memories are suggestible and malleable and can be distorted by books, magazines, movies, and other social influences.[30] They also contend that therapists, intentionally or unintentionally, encourage women to believe that they

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ness . . ., and persistent symptoms of increased arousal . . . ." *Id.* *See also* Alan Rosenfeld, *The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy*, 12 HARV. WOMEN'S L.J. 206, 208-10 (1989) (comparing Post-Incest Syndrome to Post-Traumatic Stress Disorder).

25. *See* Gordon, *supra* note 15, at 1366.

26. *Id.* Gordon notes that "child victims . . . are slowly conditioned into a pattern of submission and silence which allows the abuse to continue over an extended period of time . . . often [causing] the child to develop feelings of helplessness and guilt or responsibility . . . which in turn, further prevent the child from breaking the silence." *Id.* at 1364.

27. *See, e.g.*, Minouche Kandel & Eric Kandel, *Flights of Memory*, DISCOVER, May 1994, at 32. Although biology cannot yet explain "what might happen in human brains when memories are repressed, or when they are recovered[,] . . . biology *can* provide insights into how a memory is stored, how that storage is regulated, and whether this regulation is compatible with repression and with a later return of memory." *Id.* at 36.

28. Wartik, *supra* note 18, at 65 (quoting Dr. Lenore Terr, a professor of psychiatry at the University of California at San Francisco).

29. *See* Kandel & Kandel, *supra* note 27, at 34. The article notes the efforts of Linda Meyer Williams, a sociologist at the University of New Hampshire, to track and provide evidence of memory repression. The research involved studying the hospital records of 129 women who were treated for sexual abuse while they were young girls, in the mid-seventies, and later asking these women to discuss any abuse they experienced as children. Meyer's research concluded that:

> More than one-third had no memory of, or chose not to report, the molestation documented in their medical records. Since over half of these women discussed other incidents of sexual abuse, selective amnesia is a more likely explanation for their response (or lack of it) than any unwillingness to discuss sex.

Id.

30. *See* PENDERGRAST, *supra* note 19, at 94.

were abused, to reconstruct their pasts, and to rehearse it in their minds until it becomes real to them.[31]

Judicial wariness in deciding cases of child sexual abuse involving repressed memory generally stems from the lack of empirical evidence supporting the theory of repression. In addition, courts are concerned about the validity of therapeutic techniques, such as hypnosis, used in retrieving memories from abuse victims who experience traumatic amnesia.[32] Ultimately, the courts are concerned about the conglomerate of therapy issues, namely "the preconceptions of the therapist, the suggestibility of the patient, the aleatory nature of memory recall, and the need to find a clear culprit for a diffuse set of symptoms, [which] may lead to false memories" and hence, false allegations.[33] Nevertheless, courts nationwide face an increasing number of abuse cases each year and continue to reach decisions seemingly as varied as the facts of each case.

III. *Nuccio v. Nuccio*: Child Sexual Abuse Jurisprudence

In *Nuccio v. Nuccio*,[34] Kathleen Nuccio brought an action for negligent infliction of emotional distress resulting from repeated sexual abuse allegedly inflicted upon her by her father from the age of three to the age of thirteen.[35] She delayed filing her claim for approximately thirty-two years after the last alleged incident of sexual abuse or assault. Kathleen contended that this delay was due to traumatic amnesia, which caused her to repress her memories of the abuse until 1992.[36] Luke Nuccio raised the statute of limitations as an affirmative defense.[37]

After the United States District Court for the District of Maine granted summary judgment in favor of Luke based on the statute of limitations, Kathleen appealed to the United States Court of Appeals for the First Circuit.[38] On its own motion, the court of appeals certified the following question to the Law Court:

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31. *See id.*

32. *See id.* at 121 (explaining that "memories retrieved under hypnosis are suspect [because] the very definition of the process . . . invariably includes the concept of suggestion").

33. S.V. v. R.V., 933 S.W.2d 1, 18 (Tex. 1996). The Supreme Court of Texas explained that, "[f]or purposes of applying the discovery rule, expert testimony on subjects about which there is no settled scientific view—indeed, not even a majority scientific view—cannot provide objective verification of abuse." *Id.*

34. 62 F.3d 14 (1st Cir. 1995).

35. *See* Brief of Appellee at 2, Nuccio v. Nuccio, 673 A.2d 1331 (Me. 1996) (No. FED-95-518).

36. *See id.*; *see also* Brief of the Appellant at 5, Nuccio v. Nuccio, 673 A.2d 1331 (Me. 1996) (No. FED-95-518).

37. *See* Brief of Appellee at 6.

38. *See* Nuccio v. Nuccio, 62 F.3d 14 (1st Cir. 1995).

> Does a showing that a plaintiff, who was the victim of childhood sexual abuse, suffered repressed memory as a result of a defendant's threats of violence and generally violent nature, her witnessing acts of violence by the defendant, and her fear of the defendant, provide a basis for the application of equitable estoppel so as effectively to toll the statute of limitations during the period that the plaintiff's memories remain repressed?[39]

The Law Court answered in the negative and affirmed summary judgment in favor of Luke, declining to invoke equitable principles to bar the statute of limitations affirmative defense.[40]

A. Statutes of Limitations

1. The Effect of Statutes of Limitations in Child Sexual Abuse Civil Suits

Until the last half of this century, childhood sexual abuse was rarely discussed.[41] Today, however, it is not uncommon for survivors of such abuse to "demand accountability from their abusers" by filing civil suits.[42] Civil remedies can benefit survivors by providing compensation for lost wages and the costs of long-term psychotherapy.[43] However, child sexual abuse survivors are often denied the opportunity to reveal the facts of the abuse in court because their claims are not filed within the time allotted by the statute of limitations.[44]

Statutes of limitations are legislatively imposed time limits that require plaintiffs to file civil suits within a specified time period.[45] With these statutes, legislatures define that time period in terms of when the cause of action accrues.[46] In many cases, the meaning of "accrues" raises dispute because interpretations are varied and statutory language is ambiguous.[47] Depending on the cause of action

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39. *Id.* at 18.

40. *See* Nuccio v. Nuccio, 673 A.2d 1331, 1335 (Me. 1996).

41. *See, e.g.,* Kandel & Kandel, *supra* note 27, at 32 (noting that "[u]ntil the early 1970s the sexual abuse of children was largely ignored: their stories were doubted and minimized, or they were blamed for encouraging their molestation").

42. Gordon, *supra* note 15, at 1369.

43. *See id.*

44. *See, e.g.,* Lamm, *supra* note 23, at 2190 (arguing that victims of sexual abuse, because of the psychological reactions that they suffer, are often unable to file a civil tort claim within the statutory time frame). For further discussion on statutes of limitations as a legal barrier for childhood sexual abuse survivors, see generally Rosenfeld, *supra* note 24.

45. *See* Lamm, *supra* note 23, at 2196.

46. *See id.*

47. *See, e.g.*, Urie v. Thompson, 337 U.S. 163 (1949). Faced with varied constructions of the applicable statute of limitations presented by the Federal Employers' Liability Act, the United States Supreme Court examined in detail the point at which the employee, in fairness, should have known of his illness and its connection

and the jurisdiction, "[s]ome statutes specify that [the action accrues] . . . on the date that the incident causing the damage occurred. Others specify that the statute begins to run on the date that the plaintiff discovers that the damages are caused by a particular action."[48] Finally, some statutes do not define accrual at all and thus permit judicial interpretation of accrual on a case by case basis.[49]

The primary purposes of statutes of limitations are to establish a point of repose and to terminate stale claims.[50] According to courts in some jurisdictions, the "primary consideration underlying all statutes of limitations is undoubtedly one of fairness to the defendant."[51] Nevertheless, courts recognize that these legislatively imposed time limits often sacrifice logic for practicality and efficiency; furthermore, courts note that statutes of limitations "are by definition arbitrary, and their operation does not discriminate between the just and unjust claim, or the avoidable and unavoidable delay."[52]

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to his employment to determine when the employee's cause of action would have accrued. *See id.* at 168-71.

48. Rosenfeld, *supra* note 24, at 211.

49. *See id.*

50. *See* S.V. v. R.V., 933 S.W.2d 1 (Tex. 1996). The Supreme Court of Texas stated the important policy considerations behind statutes of limitations:

> "Limitations statutes afford plaintiffs what the legislature deems a reasonable time to present their claims and protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise."

S.V. v. R.V., 933 S.W.2d at 3 (quoting Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 828 (Tex. 1990)).

51. Rosenfeld, *supra* note 24, at 211. *See, e.g.*, Ruth v. Dight, 453 P.2d 631, 634 (Wash. 1969). The Supreme Court of Washington stated:

> Statutes of limitation, although having their origins in legislative proceedings—aside from equitable principles of laches and estoppel—thus contemplate that a qualified freedom from unending harassment of judicial process is one of the hallmarks of justice. No civilized society could lay claim to an enlightened judicial system which puts no limits on the time in which a person can be compelled to defend against claims brought in good faith, much less whatever stale, illusory, false, fraudulent or malicious accusations of civil wrong might be leveled against him.

Id.

52. Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945). In this oft-quoted opinion, Justice Jackson stated:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. . . . They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists,

In child sexual abuse civil cases, statutes of limitations impose a tremendous burden on plaintiffs whose repressed memories of the abuse are not recalled until the statutory time limit has expired. For instance, in *Smith v. Smith*,[53] a thirty-two year old claimant brought an action against her father alleging that he had repeatedly sexually abused her until she was twelve years old.[54] The daughter contended that she suffered from post-traumatic stress disorder which "caused her to repress her memories of the incestuous occurrences of her childhood and disabled her from instituting litigation which might stimulate a traumatic recall of the childhood events."[55] Because New York law does not specifically address repressed memory in childhood sexual abuse cases, the plaintiff argued that she was insane as a result of the abuse.[56] The United States Court of Appeals for the Second Circuit, applying New York law, held that the plaintiff "was not insane" within the meaning of the law and that the statute of limitations applicable to the daughter's action against her father could not be tolled.[57]

Pursuant to the language of the New York statute,[58] the *Smith* court concluded that the statute applied only to those individuals "who are unable to protect their legal rights because of an over-all inability to function in society."[59] Under New York law, "[t]he stat-

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but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Id. (citation and footnote omitted).

53. 830 F.2d 11 (2d Cir. 1987).

54. *See id.* at 12.

55. *Id.*

56. *See id.*

57. *Id.*

58. New York has no statutory delayed discovery rule for child sexual abuse offenses. Hence, the victim in *Smith* filed suit pursuant to N.Y. C.P.L.R. 208 (McKinney 1990):

> If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues, and the time otherwise limited for commencing the action is three years or more and expires no later than three years after the disability ceases, or the person under the disability dies, the time within which the action must be commenced shall be extended to three years after the disability ceases or the person under the disability dies, whichever event first occurs; if the time otherwise limited is less than three years, the time shall be extended by the period of disability. The time within which the action must be commenced shall not be extended by this provision beyond ten years after the cause of action accrues, except, in any action other than for medical, dental or podiatric malpractice, where the person was under a disability due to infancy. This section shall not apply to an action to recover a penalty or forfeiture, or against a sheriff or other officer for an escape.

Id.

59. Smith v. Smith, 830 F.2d at 12 (quoting McCarthy v. Volkswagen of Am., Inc., 435 N.E.2d 1072, 1075 (N.Y. 1980)).

ute . . . cannot be interpreted as providing a toll of the Statute of Limitations to an individual claiming a mere post traumatic neurosis."[60] Thus, in New York, the absence of legislation specifically addressing claims of childhood sexual abuse renders a survivor of such abuse alleging repressed memory powerless against the defendant's statute of limitations defense. The court's interpretation of the New York statute expressly excludes "post traumatic neurosis" from the definition of insanity. New York law provides an example of how statutes of limitations can effectively punish the survivor for what may appear to be a lack of diligence in filing a claim when, in fact, "her inability to initiate the legal action is a direct result of childhood sexual abuse."[61]

2. *The Effect of Maine's Statute of Limitations in* Nuccio

In Maine, the Law Court has recognized that the "statute of limitations represents a balance of several competing interests."[62] Statutes of limitations provide plaintiffs with the opportunity to pursue meritorious claims and grant defendants eventual repose and protection from defending stale claims, which often involve "faded memories, dead or otherwise unavailable witnesses, and lost or destroyed evidence."[63] The statute of limitations for civil actions in Maine provides, in pertinent part: "All civil actions shall be commenced within 6 years after the cause of action accrues and not afterwards . . . ."[64]

Pursuant to title 1, section 73[65] and title 14, section 853[66] of the Maine Revised Statutes, the accrual date of Kathleen Nuccio's action was extended until the year she attained majority in 1969.[67]

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60. McCarthy v. Volkswagen of Am., Inc., 435 N.E.2d at 1075. This case signaled the increasing reluctance of New York courts to construe the term "insanity" liberally. The *McCarthy* court noted that the "tolling provisions should not readily be given an expansive interpretation tending to undermine the basic purpose behind Statutes of Limitation." *Id.* at 1074.

61. Rosenfeld, *supra* note 24, at 212. Mr. Rosenfeld states: "Current law has an unconscionable effect in that it rewards abusers when their actions cause the victim to be severely traumatized, thereby decreasing the survivor's ability to sue, by providing a shield from liability." *Id.*

62. Myrick v. James, 444 A.2d 987, 994 (Me. 1982).

63. *Id.*

64. ME. REV. STAT. ANN. tit. 14, § 752 (West 1980).

65. ME. REV. STAT. ANN. tit. 1, § 73 (West 1989) ("[P]ersons 18 years of age or over are declared to be of majority for all purposes.").

66. ME. REV. STAT. ANN. tit. 14, § 853 (West Supp. 1996-1997). This section provides, in pertinent part:

> If a person entitled to bring any of the actions under sections 752 to 754, . . . 851, [and] 852 . . . is a minor, mentally ill, imprisoned or without the limits of the United States when the cause of action accrues, the action may be brought within the times limited herein after the disability is removed.

Id.

67. *See* Nuccio v. Nuccio, 673 A.2d 1331, 1334 (Me. 1996).

Thus, under the statute of limitations for civil actions in place at the time Kathleen was allegedly abused, she had six years, upon attaining majority, to file her claim. Therefore, because Kathleen Nuccio failed to file her claim six years after she attained majority and, in fact, did not file her claim until approximately twenty-three years after she attained majority, and thirty-two years after the last alleged assault, her claim was subsequently barred by the statute of limitations in 1975.[68]

B. Delayed Discovery Rules

1. The Development of the Delayed Discovery Rule and Its Application in Child Sexual Abuse Cases

In light of the burden imposed by statutes of limitations, adult survivors of child sexual abuse who suffered from repressed memory have generally relied upon delayed discovery rules to avoid having their claims barred by statutes of limitations.[69] In general, delayed discovery rules provide that "a statute of limitations does not begin to run until the plaintiff, using reasonable diligence, would have discovered the cause of action."[70] The seminal cases on the delayed discovery rule are *Ruth v. Dight* [71] and *Urie v. Thompson*,[72] which recognize the inherent injustice in imposing rigid time restrictions on plaintiffs who are unaware of the harm, or the cause of the harm, inflicted upon them until *after* the statute of limitations has run.

In *Ruth*, the plaintiff brought a medical malpractice action against her surgeon's estate and the hospital for negligently leaving a surgical sponge in her abdomen for over twenty years, causing her recurring pain and discomfort.[73] The plaintiff was unaware that the sponge was in her body and thus was unable to attribute her pain and discomfort to the negligence of the doctor until the sponge was discovered more than twenty years later during an exploratory operation.[74] The Supreme Court of Washington adopted the discovery rule after balancing the harm to a surgical patient of being "deprived of a remedy" versus the harm to the defendant surgeon of being sued twenty-two years after he performed allegedly negligent surgery.[75] The court reasoned that principles of "fundamental fairness" afforded the plaintiff the right to go forward with her claim.[76]

68. The Law Court concluded that "no other statutory provision applies to toll the limitation of the statute" in this case. *Id.*

69. *See* Gordon, *supra* note 15, at 1375.

70. Tyson v. Tyson, 727 P.2d 226, 227 (Wash. 1986) (citing U.S. Oil & Ref. Co. v. State, 633 P.2d 1329, 1333 (Wash. 1981)). *See generally* Gordon, *supra* note 15.

71. 453 P.2d 631 (Wash. 1969).

72. 337 U.S. 163 (1949).

73. *See* Ruth v. Dight, 453 P.2d at 633.

74. *See id.*

75. *Id.* at 635.

76. *Id.* at 634, 636.

In *Urie*, the plaintiff filed suit under the Federal Employers' Liability Act against his employer after being diagnosed with silicosis, a pulmonary disease.[77] After thirty years of working as a fireman on steam locomotives and having continuously inhaled "silica dust blown or sucked into the cabs of the locomotives on which he had worked," the plaintiff argued that the defendant, by the exercise of due care, should have known of the dangers of such conditions.[78] The Supreme Court held that the discovery rule applied because the plaintiff did not know of his injury, and the causal connection of that injury to the defendant's conduct, until years after his employment with the company had terminated and the statute of limitations had expired.[79] The Court stated: "We do not think the humane legislative plan intended such consequences to attach to *blameless ignorance*."[80]

Although the discovery rule has been applied to professional malpractice and employer liability cases like those discussed above, courts were initially reluctant to employ the rule in childhood sexual abuse cases involving repression, due to both insufficient evidence of abuse and lack of empirical evidence validating the repressed memory theory.[81] Nevertheless, an extensive study conducted in 1993 reported that approximately "twenty-one states allow the statute of limitations to be tolled in civil cases *where a victim of child sexual abuse has repressed all memory of the incident*."[82] According to this study, "[t]hese numbers are especially remarkable since as late as 1986 no states allowed such cases."[83] The national trend of enacting legislation, such as discovery rules, to toll the statute of limitations in childhood sexual abuse cases continues to grow in spite of the inconclusiveness of repressed memory research.[84]

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77. *See* Urie v. Thompson, 337 U.S. at 165-66.

78. *Id.*

79. *See id.* at 170.

80. *Id.* (emphasis added).

81. *See, e.g.*, Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 154 (1993). This article suggests that, because of the unreliability of repressed memories, courts should "implement procedural safeguards to minimize injustice occurring at the expense of an innocent defendant." *Id.* at 132.

82. *Id.* at 147 (emphasis added).

83. *Id.*

84. Many states have adopted legislation tolling the statute of limitations for civil suits alleging childhood sexual abuse including, but not limited to: Alaska (three years after discovery), ALASKA STAT. § 09.10.140(b)(1)-(2) (Michie 1996); Arkansas (three years after discovery), ARK. CODE ANN. § 16-56-130(a)-(b)(1) (Michie Supp. 1995); California (three years after discovery), CAL. CIV. PROC. CODE § 340.1 (West Supp. 1997); Colorado (six years after discovery), COLO. REV. STAT. ANN. § 13-80-103.7 (Bradford Supp. 1996); Florida (four years after discovery), FLA. STAT. ANN. § 95.11(7) (West Supp. 1997); Iowa (four years after discovery), IOWA CODE ANN. § 614.8A (West Supp. 1996); Kansas (three years after discovery), KAN. STAT. ANN.

One of the first childhood sexual abuse cases to involve the discovery rule was *Tyson v. Tyson*.[85] In *Tyson*, the plaintiff alleged that she was sexually abused by her father between the ages of three and eleven.[86] She "further alleged that the sexual assaults caused her to suppress any memory of the acts and that she did not remember the alleged acts until she entered psychological therapy during 1983."[87] The arguments set forth by the *Tyson* majority and dissent profoundly demonstrate the early struggle that the judicial system had with the concept of repressed memory and childhood sexual abuse. In short, the majority held that the "discovery rule does not apply to an intentional tort claim where the plaintiff has blocked the incident from her conscious memory during the period of the statute of limitations."[88] The majority based its decision on the lack of "empirical, verifiable evidence" available to support the alleged sexual abuse.[89]

§ 60-523 (1994); Maine (six years after discovery), ME. REV. STAT. ANN. tit. 14, § 752-C (West Supp. 1996-1997); Missouri (three years after discovery), MO. ANN. STAT. § 537.046 (West Supp. 1997); Montana (three years after discovery), MONT. CODE ANN. § 27-2-216(1)(b) (1995); New Hampshire (three year discovery rule for *all* civil actions), N.H. REV. STAT. ANN. § 508:4 (Supp. 1996); Nevada (ten years after discovery), NEV. REV. STAT. ANN. § 11.215 (Michie Supp. 1993); New Mexico (three years after discovery), N.M. STAT. ANN. § 37-1-30 (Michie Supp. 1996); Oregon (three years after discovery), OR. REV. STAT. § 12.117 (1995); Rhode Island (seven years after discovery), R.I. GEN. LAWS § 9-1-51 (Supp. 1996); South Dakota (three years after discovery), S.D. CODIFIED LAWS § 26-10-25 (Michie 1992); Vermont (six years after discovery), VT. STAT. ANN. tit. 12, § 522 (Supp. 1996).

85. 727 P.2d 226 (Wash. 1986).

86. *See id.* at 227.

87. *Id.*

88. *Id.* at 230.

89. *Id.* at 229. The *Tyson* majority stated that the plaintiff's "claim rests on a subjective assertion that wrongful acts occurred and that injuries resulted. There is no objective manifestation of these allegations. Rather, they are based on plaintiff's alleged recollection of a memory long buried in the unconscious which she asserts was triggered by psychological therapy." *Id.* *See also* S.V. v. R.V., 933 S.W.2d 1 (Tex. 1996). In *S.V. v. R.V.*, the Supreme Court of Texas held that an alleged survivor of childhood sexual abuse could not invoke the discovery rule to bar her father from raising the statute of limitations because the alleged survivor "adduced no evidence of abuse." *Id.* at 3. This court explained that a "principal factor in deciding whether to apply the discovery rule has been to what extent the claim was objectively verifiable." *Id.* at 6. In addition, expert testimony was deemed insufficient to supply the objective verification of wrong and injury necessary for application of the discovery rule, primarily due to the survivor's inability to provide evidence of abuse and to the scientific community's inability to reach "consensus on how to gauge the truth or falsity of 'recovered' memories." *Id.* at 18; State v. Hungerford, Nos. 94-S-045 to 94-S-047, 93-S-1734 to 93-S-1936, 1995 WL 378571 (N.H. Sup. Ct. May 23, 1995). In *Hungerford*, the Superior Court of New Hampshire did not admit the victims' testimony as to their memory of the alleged abuse because the "reliability of the phenomenon" of repressed memory had not been established. *Id.* at *11. Furthermore, the court maintained that under the *Frye* test, "the process of therapy used in these cases to recover the memories, ha[s] not gained general acceptance in the field of psychology; and [is] not scientifically reliable." *Id.* at *1.

According to the dissent, however, "objective, verifiable" proof of the abuse was not a prerequisite for the imposition of the discovery rule and thus should not have been an issue before the court.[90] While underscoring the importance of the discovery rule in childhood sexual abuse cases involving repressed memory, the dissent maintained that, "*[f]undamental fairness*, not availability of objective evidence, has always been the linchpin of the discovery rule."[91] Consequently, "[i]n 1988, two years after the Washington Supreme Court's decision in Tyson, the Washington state legislature enacted legislation to provide for the tolling of the statute of limitations through the discovery rule in sexual abuse cases."[92]

The first reported court decision successfully invoking the discovery rule to toll the statute of limitations in a child sexual abuse case was *Hammer v. Hammer*.[93] In this case, the survivor of the alleged abuse had two years to bring a cause of action once she had attained the age of eighteen.[94] The plaintiff subsequently brought her cause of action when she was twenty-one, almost two years after the statute of limitations had run.[95] Although the plaintiff in *Hammer* had not repressed memories of the abuse, she maintained that she had developed defense mechanisms to cope with the shock and had thus been unable to recognize the harmful effects of the alleged abuse until ten years later.[96] The Wisconsin Court of Appeals held that the discovery rule applied, reasoning that the rule was "formulated to avoid the harsh results produced by commencing the running of the statute of limitations before a claimant was aware of any basis for an action."[97]

Still, some courts take a stricter approach than the *Hammer* court and maintain that the discovery rule can only be invoked if the plaintiff alleges with sufficient specificity that she repressed her

90. Tyson v. Tyson, 727 P.2d at 231-32 (Pearson, J., dissenting). The dissent argued, in response to the majority's evidentiary requirement in *Tyson*, that:

> [A]ctions which essentially turn on credibility of the parties are not unique. The trier of fact frequently is asked to determine the outcome of a lawsuit by deciding which party is telling the truth. . . . It is illogical to foreclose a cause of action alleging sexual abuse just because the parties' credibility will be determinative, when such "swearing contests" are common in other contexts.

Id. at 231-32.

91. *Id.* at 231 (Pearson, J., dissenting) (emphasis added). The *Tyson* dissent contended that the discovery rule "is applicable to complaints alleging negligence and intentional torts by adult survivors of childhood sexual abuse where the trier of fact finds that the plaintiff has repressed all conscious memory of such abuse during the entire period of the statute of limitations." *Id.* at 235.

92. Gordon, *supra* note 15, at 1379.

93. 418 N.W.2d 23 (Wis. Ct. App. 1987).

94. *See id.* at 24 n.4.

95. *See id.*

96. *See id.* at 25.

97. *Id.* at 26.

memories of the abuse. For instance, in *DeRose v. Carswell*,[98] the plaintiff brought an action against her step-grandfather for alleged child sexual abuse, contending that the discovery rule should apply because "she did not appreciate until recently the causal relationship between the alleged assaults and her emotional injuries, even though she was aware of the assaults."[99] The California Court of Appeals for the Sixth District held that, because the plaintiff was "actually aware long ago of the facts necessary to state a cause of action against Carswell based upon the sexual assaults," and because she did not allege that she repressed her memories of the abuse, the plaintiff could not invoke the discovery rule.[100]

2. *Maine's Delayed Discovery Rule and Its Limitations in Child Sexual Abuse Cases:* Nuccio *and Its Predecessors*

Under Maine law, the discovery rule has its origin in title 14, sections 752-A[101] and 859[102] of the Maine Revised Statutes, tolling the statute of limitations for malpractice actions against design professionals and tolling the statute of limitations until an aggrieved party has become aware of the existence of a fraudulently concealed cause of action, respectively. Conversely, the discovery rule was judicially crafted in the medical malpractice arena. For instance, in *Myrick v. James*,[103] the Maine Law Court held that, because section 753 does not specifically define accrual, "a foreign-object surgical malpractice action accrues . . . when the plaintiff discovers, or, in the exercise of reasonable care and diligence, should discover the presence of the foreign object in her body."[104] According to the *Myrick* court, because no explicit legislative opinion existed regarding foreign-object medical malpractice, it was within the province of the court to "establish a rule consonant with our present day concepts of right and justice."[105]

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98. 242 Cal. Rptr. 368 (Cal. Ct. App. 1987).

99. *Id.* at 370.

100. *Id.* at 371-72. *See also* Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988) (holding that the plaintiff, who repressed all memory of childhood sexual abuse for over ten years, was permitted to file suit against her father pursuant to the discovery rule).

101. ME. REV. STAT. ANN. tit. 14, § 752-A (West 1980) ("All civil actions for malpractice or professional negligence against architects or engineers duly licensed or registered under Title 32 shall be commenced within 4 years after such malpractice or negligence is discovered . . . .").

102. ME. REV. STAT. ANN. tit. 14, § 859 (West Supp. 1996-1997). *See infra* note 186.

103. 444 A.2d 987 (Me. 1982).

104. *Id.* at 996.

105. *Id.* at 998 (quoting Molitar v. Kaneland Community Unit Dist. No. 302, 163 N.E.2d 89, 96 (Ill. 1959)). The dissent strongly opposed the majority's decision, stating that "[s]uch judicial activism as displayed in the instant case is constitutionally prohibited and contrary to legal precedents of this Court which have stood for more

More recently, the Legislature enacted a discovery rule to apply to child sexual abuse cases in Maine. In 1985, the Maine State Legislature enacted title 14, section 752-C, establishing a statute of limitations related specifically to sexual acts toward minors.[106] In 1989, the Legislature amended this section to include a three year discovery rule.[107] In 1991, the Legislature extended the time for commencement of an action for child sexual abuse based on discovery from three years to six years.[108] More important, the application clause accompanying the 1991 extension of the statute prohibits plaintiffs from invoking the discovery rule for sexual abuse occurring before 1991.[109] Therefore, actions involving sexual abuse prior to 1991 are to be considered under the previous statute of limitations, which *does not include* a discovery rule.

Maine's discovery rule, as a response to the increasingly recognized child sexual abuse epidemic, left a hole through which many meritorious childhood sexual abuse actions will fall because of repressed memories. The Legislature, by incorporating a discovery rule in section 752-C, evidently recognized the potential problems associated with repressed memory and sought to provide a remedy for sexually abused victims by tolling the statute of limitations until the abuse is discovered. However, the Legislature recognized repression *only to the extent* that it related to abuse occurring after 1991. Perhaps the legislative intent was to draw a line of demarcation in order to prevent an overabundance of child sexual abuse litigation in the judicial system, particularly when the abuse may have occurred many years prior to filing suit. Consequently, the discovery rule found in section 752-C of the Maine Revised Statutes does

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than one hundred and fifty years." *Id.* at 1004 (Nichols and Dufresne, JJ., dissenting).

106. *See* P.L. 1985, ch. 343, § 1.

107. *See* P.L. 1989, ch. 292.

108. *See* ME. REV. STAT. ANN. tit. 14, § 752-C (West Supp. 1996-1997). This section provides that:

> Actions based upon sexual intercourse, as defined in Title 17-A, section 556, subsection 1-B, or a sexual act, as defined in Title 17-A, chapter 11, with a person under the age of majority must be commenced within 12 years after the cause of action accrues, or within 6 years of the time the person discovers or reasonably should have discovered the harm, whichever occurs later.

Id. (footnote omitted).

109. The 1991 amendment to this Act included an application clause providing that:

> This Act applies to the following actions based upon sexual intercourse or a sexual act with a person under the age of majority:
>
> 1. All actions based upon sexual intercourse or a sexual act occurring after the effective date of this Act; and
>
> 2. All actions for which the claim has not yet been barred by the previous statute of limitations in force on the effective date of this Act.

P.L. 1991, ch. 551, § 2.

not apply to those victims who were abused prior to 1991 and who suffered from repression; they must abide by the previous statute of limitations. Thus, victims of abuse that occurred prior to 1991 are left without a legal remedy if the statute of limitations has run.

For instance, in *McAfee v. Cole*,[110] the plaintiff brought an action alleging that the defendants sexually abused him when he was a minor. Like Kathleen Nuccio, McAfee contended that he repressed all memory of the abuse until long after the applicable statute of limitations had expired.[111] Speaking for the Law Court, Justice Rudman maintained that, because the alleged sexual abuse occurred prior to 1991, "the discovery rule of the 1991 Act only applies to McAfee's claims if, pursuant to subsection 2, they were not already barred by the previous statute of limitations."[112] The court concluded that because McAfee's claim was, indeed, barred by the previous statute of limitations, he was without a remedy.[113] Similarly, in *Nuccio*, Kathleen's cause of action had expired by 1975 under the statute of limitations in effect when she reached majority.[114] Therefore, the discovery clause, pursuant to subsection 2 of the 1991 amendment, did not apply to her claim.[115]

Notably, in *McAfee*, the court declined to "announce a judicially crafted discovery rule applicable to the predecessor of section 752-C."[116] Then, in *Nuccio*, Maine's highest court once again held steadfast to its policy that once the Legislature has specifically addressed an issue, "and no other statutory provision applies," it is inappropriate for the court to render an inconsistent judgment.[117] According to the court's rationale, the imposition of a judicially crafted discovery rule applicable to the previous statute of limitations would improperly circumvent the explicit statutory scheme and legislative policy in child sexual abuse cases.

C. Equitable Estoppel

1. The Common Hurdles Encountered Under the Doctrine of Equitable Estoppel by Victims of Child Sexual Abuse Who Have Repressed Memories

"Under the doctrine of equitable estoppel, a person is precluded, because of his own prior conduct, from asserting a defense that he

110. 637 A.2d 463 (Me. 1994).
111. *See id.* at 465.
112. *Id.* at 466.
113. *See id.*
114. *See* Nuccio v. Nuccio, 673 A.2d 1331, 1334 (Me. 1996).
115. *See id.*
116. McAfee v. Cole, 637 A.2d at 466. In his dissent, Justice Dana maintained that the court could legitimately determine when a cause of action accrued "[i]n the absence of explicit legislative direction . . . ." *Id.* at 467 (Dana, J., dissenting).
117. Nuccio v. Nuccio, 673 A.2d at 1334.

otherwise would have had."[118] When a civil action for child sexual abuse would otherwise be barred by a statute of limitations defense, survivors may invoke equitable principles in an attempt to estop defendants from asserting that defense.[119] The recurring legal hurdles for adult survivors asserting their claims under equitable estoppel are to prove the following: that the defendant's conduct caused the subsequent delay in filing the action;[120] that the reliance on the defendant's misrepresentations was reasonably justified;[121] and, finally, that the plaintiff forms an intent to seek legal redress during the prescriptive period.[122]

First, plaintiffs often fail to prove that the defendant's conduct caused the subsequent delay in filing a cause of action. In *Smith v. Smith*,[123] for instance, the court held that the defendant/father was not equitably estopped from asserting the statute of limitations defense because his daughter did not establish that the defendant had prevented her from suing for the alleged abuse.[124] The court concluded that the "post-traumatic neurosis" from which the daughter suffered "was an unintended consequence of the assaults for which she now seeks damages."[125] According to the court, the plaintiff's injury was caused by the alleged sexual abuse, an intentional tort; "[i]t did not result from a separate and independent wrong. The doctrine of equitable estoppel usually comes into play when some conduct by a defendant after his initial wrongdoing has prevented the plaintiff from discovering or suing upon the initial wrong."[126]

Second, plaintiffs are routinely unable to prove that their reliance on the defendants' misrepresentations was reasonably justified. In *Doe v. Roe*,[127] the plaintiff argued that the "defendant should be equitably estopped from asserting the Statute of Limitations defense

118. Rosenfeld, *supra* note 24, at 217 (citation omitted).

119. *See* Lamm, *supra* note 23, at 2198 (explaining that inherent in equitable estoppel arguments by child abuse survivors is the belief that "the psychological injury complained of[,]" namely repression, "is exactly what caused [the plaintiff's] delay in filing suit"). *See also* DeRose v. Carswell, 242 Cal. Rptr. 368, 377 (Cal. Ct. App. 1987) (noting one survivor's statement that, as child victims, they were under the power and authority of the defendant abuser and were "subject to coercion, duress, menace, threat and fear of harm from defendant... should she tell or attempt to tell others of said acts").

120. *See* Smith v. Smith, 830 F.2d 11, 13 (2d Cir. 1987). *See also infra* notes 123-26 and accompanying text.

121. *See* Doe v. Roe, 596 N.Y.S.2d 620, 621 (N.Y. App. Div. 1993). *See also infra* notes 127-30 and accompanying text.

122. *See* DeRose v. Carswell, 242 Cal. Rptr. 368, 377 (Cal. Ct. App. 1987). *See also supra* notes 98-100 and accompanying text; *infra* notes 131-35 and accompanying text.

123. 830 F.2d 11 (2d Cir. 1987).

124. *See id.* at 13.

125. *Id.*

126. *Id.* (citation omitted).

127. 596 N.Y.S.2d 620 (N.Y. App. Div. 1993).

because it was his conduct that induced her to refrain from taking earlier action."[128] The court concluded, however, that the "[d]efendant's alleged fraudulent conduct may have facilitated access to plaintiff and may have managed to keep the alleged sexual abuse secret, but it did not directly give rise to the injuries for which plaintiff seeks recovery."[129] Thus, the plaintiff could "not avail herself of equitable estoppel because she failed to establish . . . that she was justified in relying on his conduct or misrepresentations."[130]

Finally, claimants consistently fail to prove an intent to seek legal redress within the prescriptive time period. The plaintiff in *DeRose v. Carswell*,[131] in addition to her attempt to invoke the discovery rule as previously discussed, argued that the defendant's "conduct estops him to assert the statute of limitations."[132] The plaintiff contended that during the time in which she was abused, she "was under the dominance of [the] defendant, and subject to coercion, duress, menace, threat, and fear of harm from defendant . . . should she tell or attempt to tell others of said acts."[133] The court concluded that the "fundamental problem with DeRose's estoppel argument [was] that she did nothing to pursue her claims even after [defendant's] conduct ceased."[134] This problem was based on the fact that the alleged abuse terminated during DeRose's minority, during which time the statute of limitations was tolled, thus giving DeRose the "benefit of the full limitations period."[135] In other words, because plaintiff was aware of the harm done to her during the prescriptive period and had a right to sue based on that harm but did not, her estoppel argument must fail.

In some instances survivors have attempted to invoke the equitable estoppel doctrine by arguing that the gravity of the alleged tortious conduct of the defendant was so severe as to give rise to estoppel. Still, courts, in denying equitable relief to plaintiffs who have allegedly suffered from childhood sexual abuse, have said that the "gravity of the alleged tortious conduct of the defendants, in and of itself," is insufficient to give rise to estoppel.[136] Thus, in the absence of the above criteria or a demonstration of "fraud, misrepresentation, threat, or deception[,]" defendants are generally not

128. *Id.* at 621.

129. *Id.*

130. *Id.*

131. 242 Cal. Rptr. 368 (Cal. Ct. App. 1988).

132. *Id.* at 377.

133. *Id.*

134. *Id.*

135. *Id.*

136. Hoffman v. Hoffman, 556 N.Y.S.2d 608, 608-09 (N.Y. App. Div. 1990) (holding that the plaintiff, who was allegedly abused as a minor, could not invoke equitable estoppel based on the gravity of the defendant's conduct).

estopped from invoking the statute of limitations defense.[137] According to one scholar, despite judicial reluctance to employ the equitable estoppel doctrine in childhood sexual abuse cases, "equitable estoppel remains the only intellectually honest and comprehensive method to guarantee survivors a meaningful right of access to the legal system."[138]

2. *The Equitable Estoppel Argument in* Nuccio

In *Nuccio*, Kathleen's primary argument on appeal to the Law Court was that equitable estoppel should bar Luke Nuccio from asserting the statute of limitations defense.[139] There is no Maine precedent to support Kathleen's effort to bar the statute of limitations defense in a child sexual abuse case based on equitable principles. Nevertheless, Kathleen described equitable estoppel as an exception to the statute of limitations and relied on the historical development of equitable principles espoused in Maine case law to support her argument that equitable estoppel should be permitted to bar a party from raising a statute of limitations defense in child sexual abuse cases.[140]

Generally, equitable principles have been considered by Maine courts in cases involving fraudulent concealment of a cause of action,[141] undue influence and duress,[142] and misrepresentation.[143] According to the Law Court in *Townsend v. Appel*:[144]

> The gist of an estoppel barring the defendant from invoking the defense of the statute of limitations is that the defendant has conducted himself in a manner which actually induces the plaintiff not to take timely legal action on a claim. The plaintiff thus relies to his detriment on the conduct of the defendant, by failing to seek legal redress while the doors to the courthouse remain open to him. Only upon a demonstration that the plaintiff had in fact intended to seek legal redress on his claim during the prescriptive period can his failure to file suit be specifically attributed to the defendant's conduct.[145]

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137. *Id.*

138. Rosenfeld, *supra* note 24, at 218.

139. *See* Nuccio v. Nuccio, 673 A.2d 1131, 1332 (Me. 1996).

140. *See* Brief of the Appellant at 6-8, Nuccio v. Nuccio, 673 A.2d 1331 (Me. 1996) (No. FED-95-518).

141. *See, e.g.*, Bishop v. Little, 3 Me. 405, 408 (1825); Livermore Falls Trust & Banking Co. v. Riley, 108 Me. 17, 23-25, 78 A. 980, 982 (1911).

142. *See, e.g.*, Bither v. Packard, 115 Me. 306, 98 A. 929 (1916).

143. *See, e.g.*, Pino v. Maplewood Packing Co., 375 A.2d 534 (Me. 1977); Hanusek v. S. Maine Med. Ctr., 584 A.2d 634 (Me. 1990).

144. 446 A.2d 1132 (Me. 1982).

145. *Id.* at 1134 (citations omitted).

In addition, a plaintiff's reliance on a defendant's conduct must be reasonable in order to invoke the doctrine.[146]

In *Nuccio*, Kathleen argued that the severity of her father's conduct justified her failure to file a timely action.[147] According to Kathleen, because Luke murdered the family's pets in her presence, "stuffed her in an oat bin; . . . held her upside down over an outdoor privy; . . . struck her in the head so hard she later needed surgery[,]"[148] and "held a chisel against [her] throat in the workshed . . . and ordered [her] not to tell or he would cut [her] throat[,]"[149] this behavior was "*sufficient to induce the plaintiff not to take legal action on her claim.*"[150] Furthermore, Kathleen maintained that she reasonably relied upon her father's conduct and threats and that his conduct "caused her traumatic amnesia," which ultimately resulted in her delayed cause of action.[151] In her brief to the Law Court,

146. *See* Hanusek v. S. Maine Med. Ctr., 584 A.2d at 636-37. In *Hanusek*, a medical malpractice action, a patient was not permitted to employ equitable principles to estop the defendant from asserting the statute of limitations after the alleged negligence on the part of the hospital caused the plaintiff avoidable heart damage. *See id.* at 637. The court concluded that the plaintiff's forbearance in filing suit based on a statement by defendant's staff was "*not reasonable* as a matter of law." *Id.* (emphasis added). Pursuant to Maine law, "[e]stoppel flows from the actual consequences produced by the conduct of A upon B regardless of whether A subjectively intended the consequences, and which resulted because, objectively evaluated, B has justifiably relied upon A's conduct." Pino v. Maplewood Packing Co., 375 A.2d at 538-39. The purpose of estoppel is to "prevent[ ] a defendant from asserting the statute of limitations when the defendant has acted to induce the plaintiff to reasonably refrain from commencing timely legal action that the plaintiff otherwise would have taken." Vacuum Sys. v. Bridge Constr. Co., 632 A.2d 442, 444 (Me. 1993).

147. *See* Brief of the Appellant at 11, Nuccio v. Nuccio, 673 A.2d 1331 (Me. 1996) (No. FED-95-518).

148. *Id.* at 12.

149. *Id.* at 5.

150. *Id.* at 12 (emphasis added) (citation omitted). The Law Court summarized the facts presented before the trial court:

> Luke repeatedly sexually abused Kathleen, born on July 1, 1949, from the age of 3 to the age of 13 years. When Kathleen was approximately three years of age, Luke drowned kittens and killed the family dog in her presence. When she was approximately five or six, he forced her head down the opening in the toilet of an outhouse. The single threat to Kathleen's life occurred when she was ten years of age, when Luke held a sharp chisel to her throat and threatened that if she ever told anyone of the abuse, he would cut her throat. Throughout her childhood, Kathleen suffered frequent beatings and verbal abuse by Luke, with the last beating occurring when she was 17 years of age and requiring surgery to her ear.

Nuccio v. Nuccio, 673 A.2d 1331, 1333 (Me. 1996).

151. Brief of the Appellant at 14. Kathleen argued that the report by her psychiatrist provided "the evidentiary basis for application of the 'causal connection' prong." *Id.* at 13. In that report, the doctor noted a "*clear correlation* between the repeated ongoing *acts of violence* directed towards [the plaintiff] . . . and the patient's *protracted amnesia* for most of her traumatic sexual experiences . . . ." *Id.* at 13 (citing Maier Aff., Report p. 8). Kathleen contended that the "threats and violence inflicted upon [her], with the express intention of assuring her silence, consti-

Kathleen did not address her intent, if any, to seek legal redress within the prescriptive period, but she insisted that both her "fear and the amnesia were reasonable and expected consequences of the Defendant's actions . . . ."[152]

In support of her argument that equitable principles should be invoked in child sexual abuse cases involving repressed memory, Kathleen noted *Fager v. Hundt*,[153] where the Indiana Supreme Court applied equitable principles to a child abuse case when the victim had experienced traumatic amnesia. Kathleen concluded that her father's intentional violent conduct and threats caused her to repress her memories and, ultimately, induced her failure to file a timely cause of action.[154] Based on *Fager*, Kathleen asserted that "threats and violence to a small child, designed to secure her silence, so graphic and forceful as to cause traumatic amnesia, are well above the level of misconduct necessary to invoke principles of estoppel."[155] According to Kathleen, Luke Nuccio "should not be allowed to obtain the benefit of his misconduct."[156]

Luke relied on *Dasha v. Maine Medical Center* [157] to support his argument "that the stipulated facts did not meet the elements of equitable estoppel."[158] In *Dasha*, a medical malpractice action, the Maine Law Court declined to invoke equitable estoppel to estop the defendant from pleading the statute of limitations when that defendant's alleged negligence caused subsequent damage to the plaintiff's brain.[159] The court noted that the defendant made no affirmative misrepresentation nor committed any fraudulent act sufficient to

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tute separate conduct which, in the uncontradicted opinion of [the doctor], had a causal connection to her inability to remember the events upon which her law suit would be based." *Id.* at 13.

152. Brief of the Appellant at 14.

153. 610 N.E.2d 246 (Ind. 1993). The *Fager* court concluded that "the doctrine of fraudulent concealment should be available to estop a defendant from asserting the statute of limitations 'when he has, either by deception or by a violation of duty, concealed from the plaintiff material facts thereby preventing the plaintiff from discovering a potential cause of action.'" *Id.* at 251 (quoting Burks v. Rushmore, 534 N.E.2d 1101, 1104 (Ind. 1989)).

154. *See* Brief of the Appellant at 14. Kathleen noted that in *Fager*, the court considered the relationship between parent and child and recognized the "fraudulent concealment exception to the statute of limitations where a parent's abuse has caused traumatic amnesia." *Id.* at 11 n.7. In Maine, fraudulent concealment of a cause of action has been deemed sufficient to avoid the statute of limitations. This doctrine was legislatively mandated in 1954 by the adoption of title 14, section 859 of the Maine Revised Statutes. *See infra* note 186.

155. Reply Brief of the Appellant at 2, Nuccio v. Nuccio, 673 A.2d 1331 (Me. 1996) (No. FED-95-518).

156. Brief of the Appellant at 14.

157. 665 A.2d 993 (Me. 1995).

158. Brief of Appellee at 11.

159. Dasha v. Maine Med. Ctr., 665 A.2d at 995. Justice Lipez's dissent encouraged the court to "apply equitable principles to prevent a defendant from using fraudulent conduct, *or the equivalent thereof*, to invoke a statutory defense in a man-

support the assertion of equitable estoppel.[160] Furthermore, the court concluded that although the "statutory scheme may be deemed unfair or harsh, we decline to circumvent it when the Legislature has explicitly decided the issue."[161]

Based on this holding in *Dasha*, Luke Nuccio concluded that "there is no showing of an affirmative misrepresentation as is required to support the application of equitable estoppel nor any showing of any reliance on the part of the Plaintiff in deciding to forego seeking legal redress."[162] Luke argued that because Kathleen had, in fact, "no memory of [the] . . . threat by her father from 1970, when she obtained her majority, to 1993, it is clear that this threat in no way induced her to refrain from taking legal action during those 23 years."[163] In addition, Luke asserted that Kathleen made no showing that she "intended to seek legal redress on her claim during the prescriptive period."[164] He relied upon the following rule stated in *Townsend v. Appel*:[165]

> Only upon a demonstration that the plaintiff had in fact intended to seek legal redress on his claim during the prescriptive period can his failure to file suit be specifically attributed to the defendant's conduct. If, on the other hand, the evidence does not indicate that the plaintiff intended to bring suit, *even if the defendant's conduct otherwise satisfies the principles of equitable estoppel*, the defendant should not be estopped from asserting the bar.[166]

Finally, Luke concluded that, "if equitable estoppel does not apply in a case where a defendant's conduct causes severe brain damage making a plaintiff incapable of understanding or asserting his legal rights, [then] estoppel will not apply where a defendant's conduct causes a plaintiff to repress memory."[167]

In *Nuccio*, the Law Court held that, because the traumatic amnesia was an "unintended consequence" of Luke's willful conduct, Kathleen did not demonstrate that her father caused her to delay filing for thirty-two years.[168] The court concluded that "[t]here is no evidence in this record that Luke continued to utter threats or display violence toward Kathleen when, by reason of her majority, she was no longer under his control."[169] According to the court's rea-

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ner so unjust that the Legislature could not have intended the result." *Id.* at 996 (Lipez, J., dissenting) (emphasis added).

160. *See id.* at 995.
161. *Id.* at 996.
162. Brief of Appellee at 12.
163. *Id.*
164. *Id.* at 15.
165. 446 A.2d 1132 (Me. 1982).
166. *Id.* at 1134 (emphasis added).
167. Brief of Appellee at 11.
168. Nuccio v. Nuccio, 673 A.2d 1331, 1335 (Me. 1996).
169. *Id.*

soning, Kathleen's repression, allegedly caused by her father's violent conduct and threats, did not warrant invocation of equitable estoppel to bar Luke's statute of limitations defense. Maintaining that " '[e]quitable estoppel is a doctrine that should be carefully and sparingly applied,'"[170] the Law Court refused to invoke equitable estoppel to bar the statute of limitations in childhood sexual abuse cases where the survivor has repressed memories of the abuse as a result of the defendant's threats of violence and generally violent nature.

IV. DISCUSSION OF THE *NUCCIO V. NUCCIO* STANDARD: WHY THE DOCTRINE OF EQUITABLE ESTOPPEL CANNOT APPLY IN CASES OF CHILD SEXUAL ABUSE AND REPRESSION

State legislatures have responded to our national childhood sexual abuse epidemic by invoking statutory provisions, like the delayed discovery rule, to enable survivors to file claims after the applicable statute of limitations has expired. This response has allowed survivors, who have repressed their memories of the abuse, to pursue their claims once they have discovered the harm or the cause of that harm.

Maine has taken a step in this direction by enacting title 14, section 752-C of the Maine Revised Statutes which provides a delayed discovery clause in actions involving sexual acts towards minors, thereby tolling the statute of limitations. This effort, however, has a very serious short-coming in that it refuses to recognize incidents of child sexual abuse that occurred prior to 1991; it essentially excludes potentially valid claims that are barred by the previous and more restrictive statute of limitations. In *Nuccio*, the applicable statute had no discovery clause. Thus, Kathleen Nuccio had six years after she attained majority to file her claim before the statute expired, regardless of whether she was aware of the abusive acts committed against her.

Kathleen was not given the benefit of the discovery rule for survivors of child sexual abuse enacted in 1989, which was subsequently extended in 1991, even though she filed her complaint in 1993. According to the law, her claim was barred under the previous statute of limitations because the abuse she suffered occurred *prior* to 1991. Consequently, any legal remedy available to Kathleen was extinguished long before she had conscious knowledge of her potential cause of action. The court's strict adherence to the statute of limitations in *Nuccio* is based on the fact that the Legislature has already

170. *Id.* at 1334 (quoting Dasha v. Maine Med. Ctr., 665 A.2d 993, 995 (Me. 1995)).

spoken to this issue specifically. Accordingly, a judicially created discovery rule straying from the legislation would be inappropriate.

In the absence of a legal remedy, principles of equity are the only remaining remedies available for people like Kathleen Nuccio. On this basis, Kathleen argued that she was entitled to an equitable estoppel remedy to estop the defendant from raising the statute of limitations defense. According to the dissent in *Dasha*, it is appropriate to "apply equitable principles to prevent a defendant from using fraudulent conduct, or the equivalent thereof, to invoke a statutory defense in a manner so unjust that the Legislature could not have intended the result."[171] In *Townsend v. Appel*,[172] the Law Court announced the test used to determine whether equitable estoppel could bar a defendant from "invoking the defense of the statute of limitations."[173] Under this rule, the Law Court concluded that Kathleen Nuccio could not successfully invoke equitable estoppel for reasons directly related to her prolonged inability to "remember" the abuse.

The first element under the *Townsend* standard requires that the defendant's actions directly induce the plaintiff not to take timely action. In *Nuccio*, Kathleen alleged that her father repeatedly sexually abused her, engaged in generally violent behavior around her, and threatened to harm her if she told anyone of his conduct. Therefore, because Luke threatened his daughter's life if she ever told of the abuse, such conduct could be construed to have induced Kathleen not to take timely action on her claim.[174] The effect of Kathleen's repressed memories, however, obscures the potentially direct link between Luke's conduct and Kathleen's failure to file. In this case, repression, rather than Luke's abusive behavior, appears to be the factor that directly induced Kathleen not to take timely action and, hence, precludes the application of equitable estoppel under *Townsend.*

The second element under *Townsend*, a requirement that the plaintiff rely to her detriment on the defendant's conduct, is not met in *Nuccio* because Kathleen did not show that she continued to rely on her father's threats when the threats ceased or when she physically moved away from home. In fact, it can be inferred from the Law Court's decision that Kathleen led a very normal and productive life and did not present evidence of a detriment related to any

171. Dasha v. Maine Med. Ctr., 665 A.2d at 996 (Lipez, J., dissenting).

172. 446 A.2d 1132 (Me. 1982).

173. *Id.* at 1134.

174. *See* Dasha v. Maine Med. Ctr., 665 A.2d at 993. Consistent with the rationale of the *Dasha* dissent, fairness and justice demand that, where there is a direct link between the conduct of the defendant and the resulting inability of the plaintiff to pursue her claim due to repression, an equitable remedy should be available to avoid an unjust result. *See id.* at 996.

reliance on Luke's conduct.[175] The court's characterization of reliance in repression cases does not consider repression to be a manifestation of the reliance itself. Arguably, Kathleen's repression was a result of her reliance on Luke's threats and abusive conduct. Consequently, because of the repression, Kathleen was unable to manifest the requisite reliance under the *Townsend* rule.

Finally, Kathleen's intent to seek legal redress within the prescriptive period, the last requirement of equitable estoppel enunciated by the *Townsend* court, is absent from this case only because Luke's violent conduct and the threat to Kathleen's life caused Kathleen to repress these events in her mind, leaving her unable to form this intent.[176] It is not reasonable under these circumstances to expect Kathleen to have intended to seek legal redress during the past thirty years because she was completely unaware of the existence of the abuse and its effects at that time. Once she did become aware of the abuse, however, she filed her action in just over a year. Based on this analysis, the Law Court reached the appropriate result in refusing to apply equitable estoppel to this case, but only because the *Townsend* test is inapplicable to repression cases. Thus, an abuse victim who suffered from repression would be unable, under most circumstances, to invoke equitable estoppel.

If Kathleen Nuccio had *not* repressed her memories and had relied to her detriment on the conduct of her father "by failing to seek legal redress while the doors to the courthouse remaine[d] open to [her,]"[177] the Law Court may have deemed equitable estoppel an appropriate remedy. Unfortunately, due to the presence of repression in this case, the applicability of equitable estoppel to child sexual abuse cases in general must be decided at another juncture. In cases like *Nuccio*, "the application of the statute [of limitations] . . . has no redeeming rationality"[178] in light of the disturbing fact that

175. *See* Nuccio v. Nuccio, 673 A.2d at 1333, 1335. The Law Court noted that:

> Kathleen graduated from high school in the top 15% of her class, received a bachelor's degree in 1972, a master's degree in social work in 1973 and a doctorate in 1987. She has, since 1973, held a variety of professional posts, including that of a college professor, a caseworker, a research associate and a consultant.

Id. at 1333. In other words, Kathleen led a very productive life and showed little sign of being abused as a child. *But see* PENDERGRAST, *supra* note 19, at 116 n.* (stating that "[e]ven Freud, the father of repressed-memory theory, believed that large-scale repression used up so much of a person's limited store of energy that it preempted normal functioning as a human being"). Arguably, Kathleen did, in fact, show signs of her abusive childhood experiences. "Since 1970, Kathleen has been treated on both an inpatient and outpatient basis for numerous psychological afflictions including depression, multiple personality disorder and post-traumatic stress disorder." Nuccio v. Nuccio, 673 A.2d at 1333.

176. *See, e.g.*, Dasha v. Maine Med. Ctr., 665 A.2d at 997 (Lipez, J., dissenting).

177. Townsend v. Appel, 446 A.2d at 1134.

178. Dasha v. Maine Med. Ctr., 655 A.2d at 998 (Lipez, J., dissenting).

someone "can so successfully avoid liability for alleged misconduct."[179]

V. A Recommendation for an Equitable Solution

Although equitable estoppel may not apply in *Nuccio*, Kathleen may have succeeded in defeating Luke's summary judgment had she invoked the doctrine of fraudulent concealment. The Law Court did not consider the fraudulent concealment doctrine in *Nuccio* primarily because the issue was not presented. Nevertheless, in her brief to the Law Court, Kathleen did allude to fraudulent concealment in support of her argument that an equitable remedy was warranted.[180] Her authority for this proposition was *Fager v. Hundt*,[181] a case reviewed by the Indiana Supreme Court in 1993.

In *Fager*, an adult woman brought a tort action against her father for sexual abuse during her minority.[182] Like Kathleen Nuccio, the plaintiff in *Fager* contended that the sexual abuse she suffered at the hands of her father caused her to repress memories of such abuse until she was thirty-six years old.[183] The Indiana Supreme Court applied the fraudulent concealment doctrine, explaining that "the doctrine of fraudulent concealment should be available to estop a defendant from asserting the statute of limitations 'when he has, either by deception or by a violation of duty, concealed from the plaintiff material facts thereby preventing the plaintiff from discovering a potential cause of action.'"[184] In other words, the court recognized that "[b]ecause of the natural and legal obligations of parents to protect and care for their children, . . . childhood injury from the intentional felonious act of a parent" warrants employment of the fraudulent concealment doctrine after a parent has fraudulently concealed the felonious act from the child, preventing the child from discovering a potential cause of action.[185]

The doctrine of fraudulent concealment was adopted by the Maine Legislature in title 14, section 859, of the Maine Revised Stat-

179. Burpee v. Burpee, 578 N.Y.S.2d 359, 362 (Sup. Ct. 1991). Generally speaking, in addressing issues of childhood sexual abuse, courts maintain that the "law, not feelings, must govern us—or there will be no law at all." *Id.* at 362.

180. *See* Brief of the Appellant at 11 n.7, Nuccio v. Nuccio, 673 A.2d 1131 (Me. 1996) (No. FED-95-518).

181. 610 N.E.2d 246 (Ind. 1993).

182. *See id.* at 248.

183. *See id.* at 252.

184. *Id.* at 251 (quoting Burks v. Rushmore, 534 N.E.2d 1101, 1104 (Ind. 1989)). According to the *Fager* Court, "the fraudulent concealment exception does not establish a new date for the commencement of the statute of limitations, but rather creates an equitable exception." *Id.* On remand, the trial court was to determine "whether the defendant's conduct, by deception or violation of duty, operated to conceal material facts from the plaintiff, preventing her from commencing" her action within the prescribed period. *Id.* at 253.

185. *Id.* at 251.

utes.[186] Similar to the discovery rule for sexual acts towards minors stated in section 752-C, the fraudulent concealment provision provides that a person may bring an action within six years after the person wronged discovers that he has a cause of action. In Maine, it is understood that:

> [T]o prevail in a claim that a cause of action has been fraudulently concealed, a party . . . "must establish both a concealment and a fraudulent intent or design to prevent discovery of facts giving rise to [its] cause of action. Furthermore, [a party] must show that the defendant had actual knowledge of a fact before the defendant can be charged with an intent or design to conceal it from the plaintiff."[187]

Although Maine has never had an occasion to apply the fraudulent concealment doctrine to a childhood sexual abuse case, this doctrine is the last equitable remedy available to victims of child sexual abuse who have repressed memories. In *Nuccio*, Kathleen potentially could have barred her father from raising the statute of limitations had she asserted the fraudulent concealment doctrine. She could have argued that her father, by violating a natural or legal duty to protect his minor daughter, manifested a fraudulent intent to prevent her discovery—or recognition—of the abuse by threatening her life if she told anyone of his conduct. However, Kathleen may have had difficulty proving that the conduct was concealed from her because she was physically awake and aware of the conduct when it occurred. In addition, she may have had difficulty proving that her father acted to conceal the facts from her for over thirty years. Nevertheless, Kathleen could have argued that, because of her repressed memories, she was unaware of the abuse for thirty years while her father was aware of his conduct. In sum, evidence of such fraudulent intent and concealment would warrant invocation of the fraudulent concealment doctrine on behalf of Kathleen. Furthermore, fraudulent concealment could have applied because Kathleen filed her claim within six years upon discovering her cause of action.

At a minimum, fraudulent concealment would have enabled Kathleen to defeat her father's summary judgment motion based on his knowledge of the sexual abuse and her inability to remember the

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186. ME. REV. STAT. ANN. tit. 14, § 859 (West Supp. 1996-1997). This section provides:

> If a person, liable to any action mentioned, *fraudulently conceals the cause thereof from the person entitled thereto*, or if a fraud is committed which entitles any person to an action, the action may be commenced at any time within 6 years after the person entitled thereto discovers that he has just cause of action, except as provided in section 3580.

Id. (emphasis added).

187. Bangor Water Dist. v. Malcolm Pirnie Eng'rs, 534 A.2d 1326, 1329 (Me. 1988) (quoting Alexander v. Gerald E. Morrissey, Inc., 399 A.2d 503, 506 (Vt. 1979)).

abuse for an extended period of time. Application of the doctrine at this stage in the suit operates to level the playing field between the parties. The "plaintiff still carries the burden to substantiate her allegations of abuse and, if challenged, to validate the phenomenon of memory repression itself and the admissibility of evidence flowing therefrom."[188] In Maine, application of the fraudulent concealment doctrine in child abuse cases involving repression would at least bring a sense of fairness to the present arbitrary and discriminatory discovery rule, permitting victims of abuse prior to 1991 to proceed with a cause of action based on equitable principles once the abuse is discovered.

VI. CONCLUSION

Certainly, the Law Court's reluctance to create a judicially crafted discovery rule applicable to the previous statute of limitations in this case is justifiable because the Legislature has already explicitly addressed this issue. Likewise, the court's refusal to apply equitable estoppel is understandable because the evidence of repression in *Nuccio* makes application of the *Townsend* equitable estoppel test virtually impossible. Unfortunately, the Law Court did not consider fraudulent concealment as a potential bar to the statute of limitations in child sexual abuse cases involving repression, the last viable hope for Kathleen Nuccio, because the issue was not presented.

Kathleen Nuccio is reliving her abuse thirty-two years later, not because she wants to, but because her recovered memories bear an inevitable truth about her childhood. Regrettably, she is without a legal remedy and, according to the Law Court's decision, without an equitable remedy as well. According to one recently published article on child sexual abuse, "[t]he major difference between child abuse cases and all others is this: Those who make the decisions—be they judges, juries, social workers, police officers or the general public—too often act as though the 'issue' were on trial, not the facts."[189] Admittedly, "child sexual abuse is not [merely] an 'issue,' . . . [it] is a fact—a hideous, foul fact that traumatizes our culture just as it traumatizes individual victims."[190] For the very reason that child sexual abuse is a hideous fact of our culture, it is vital that our communities provide a forum for abuse victims to adjudicate their claims. Child sexual abuse is a public matter; it is not a personal problem that can be avoided or ignored by state legislatures and the courts.

Thus, until the Maine Legislature extends the discovery rule to the previous statute of limitations and provides for effective evaluation of each child sexual abuse case based on its unique facts, the

188. McCollum v. D'Arcy, 638 A.2d 797, 800 (N.H. 1994).
189. Vachss, *supra* note 14, at 5.
190. *Id.*

judiciary should invoke equitable remedies, like fraudulent concealment, on behalf of abuse victims. Under existing Maine law, certain adult survivors of child sexual abuse who experience repressed memory are arbitrarily and unjustly denied the opportunity to face their abusers in court and to hold them legally responsible for their abusive conduct. *All* child sexual abuse victims deserve to be heard. Perhaps one day the law will listen.

Christina J. D'Appolonia